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No. 02-1318

In the Supreme Court of the United States

ZAPATA HERMANOS SUCESORES, S.A., PETITIONER

v.

HEARTHSIDE BAKING COMPANY, D/B/A MAURICE LENELL COOKY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether attorneys' fees and litigation expenses are a recoverable form of "loss" under Article 74 of the United Nations Convention on Contracts for the International Sale of Goods.

2. Whether a district court may award attorneys' fees under its inherent authority as a sanction for the conduct giving rise to the litigation or for conduct during the litigation that is sanctionable under a statute or rule.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. Because the court of appeals' decision is correct, consistent with the decisions of this Court and other courts of appeals, and interlocutory, the position of the United States is that the petition for certiorari should be denied.

STATEMENT

1. Petitioner Zapata Hermanos Sucesores (Zapata), a Mexican company, supplied cookie tins to respondent Maurice Lenell Cooky Company (Lenell), an American company. Petitioner sued respondent for breach of contract under the United Nations Convention on Contracts for the International Sale of Goods (Convention), Apr. 11, 1980, S. Treaty Doc. No. 9, 98th Cong., 1st Sess. (1983). After a jury

trial in the United States District Court for the Northern District of Illinois, a judgment of approximately $1.2 million was entered in petitioner's favor. Pet. App. 1a-2a.

The district court also awarded petitioner approximately $537,000 in attorneys' fees and litigation expenses. Pet. App. 11a-22a, 23a-32a. In making this award, the court relied primarily (*id.* at 11a-18a) upon Article 74 of the Convention, which provides that "[d]amages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach," and that "[s]uch damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract." Based on a stipulation between the parties, the court found that it was foreseeable to respondent that petitioner would incur litigation costs, including attorneys' fees, in pursuing a breach-of-contract action. Pet. App. 13a. The court reasoned that those costs were recoverable as part of the "loss" under Article 74. *Id.* at 18a. As an alternative basis for the award of attorneys' fees, the district court relied on its inherent authority to impose sanctions (*id.* at 18a-20a), finding that respondent's conduct "both leading up to and during the litigation" supported such an award (*id.* at 19a).

2. The court of appeals affirmed the liability judgment but reversed the award of attorneys' fees and remanded for further proceedings. Pet. App. 1a-10a.

a. The court of appeals first held that the term "loss" in Article 74 of the Convention does not include attorneys' fees. Pet. App. 2a-4a. The court began its analysis (*id.* at 2a) by quoting Article 7(2) of the Convention, which provides that "questions concerning matters governed by th[e] Convention which are not expressly settled in it" are to be settled, if possible, "in conformity with the general principles on which it is based." The court went on to say that "[t]he Convention is about contracts, not about procedure," and that "principles

for determining when a losing party must reimburse the winner for the latter's expense of litigation" are "usually not a part of a substantive body of law, such as contract law." Pet. App. 3a. The court noted that, although there are "numerous exceptions to the principle that provisions regarding attorneys' fees are part of general procedure law," Article 74 is not one of them. *Ibid.* "[N]ot only is the question of attorneys' fees not 'expressly settled' in the Convention," the court said, "it is not even mentioned." *Ibid.* Nor, the court added, are there any "'principles' that can be drawn out of the provisions of the Convention" for determining whether "loss" includes attorneys' fees. *Ibid.* The court thus concluded that, "by the terms of the Convention itself," the availability of such fees "must be left to domestic law"—in this case, the American rule under which litigants bear their own costs. *Ibid.*

The court of appeals also believed that interpreting the term "loss" in Article 74 to include attorneys' fees "would produce anomalies." Pet. App. 4a. While, under petitioner's interpretation of Article 74, foreseeable fees are part of the prevailing plaintiff's "loss," the court questioned what effect that interpretation would have on a prevailing *defendant*'s ability to invoke domestic procedural law to recover fees and whether a prevailing plaintiff could opt to be compensated for unforeseeable fees under a domestic law that is more generous than Article 74. *Ibid.* The court also questioned whether the United States would have signed the Convention if it had thought it was abandoning the American rule, and whether the countries that routinely award fees to prevailing parties would have "thought about the question at all." *Ibid.*

b. The court of appeals also reversed the award of attorneys' fees insofar as it was based on a court's inherent authority to impose sanctions for bad-faith conduct. Pet. App. 4a-9a. The court began its analysis by observing that

the award of fees was based, in part, on the district court's "indignation at Lenell's having failed to pay money conceded to be owed by Zapata." *Id.* at 4a. While it is true, the court said, that punitive damages are sometimes awarded "for breach of contract in bad faith," petitioner "did not ask for punitive damages," and a court may not circumvent their unavailability "by renaming punitive damages 'attorneys' fees.'" *Id.* at 6a-7a. The inherent authority of federal courts to punish misconduct, the court held, "is not a grant of authority to do good, rectify [perceived] shortcomings of the common law * * * , or undermine the American rule on the award of attorneys' fees to the prevailing party in the absence of statute." *Id.* at 7a. Instead, the court said, it is "a residual authority, to be exercised sparingly," for the punishment of misconduct "(1) occurring in the litigation itself, not in the events giving rise to the litigation," and "(2) not adequately dealt with by other rules, most pertinently here Rules 11 and 37 of the Federal Rules of Civil Procedure, which Lenell has not been accused of violating." *Id.* at 7a-8a.

Having concluded that the district court had no authority to sanction respondent for its pre-litigation conduct, the court of appeals turned to the question whether the sanction was permissible on the basis of "Lenell's behavior in the litigation itself." Pet. App. 8a. Observing that the district court had "punished Lenell for having failed to acknowledge liability and spare Zapata and the judge and the jury and the witnesses and so on the burden of a trial," the court found that "the fault here was in no small measure the judge's," because petitioner should have been granted partial summary judgment based on respondent's acknowledgment of liability "for $858,000 of the $890,000 sought in the complaint." *Ibid.* Since it was reversing the award of attorneys' fees, the court did not "pick through the record to see whether some of the counterclaims or other moves by Lenell during the trial were sanctionable apart from Rule 11 and Rule 37." *Id.* at 9a. To

"guid[e] further proceedings on remand," however, the court pointed out that, to the extent that Rules 11 and 37 "place limits on the award of sanctions under them," the limitations "are equally limitations on inherent authority, which may not be used to amend the rules." *Ibid.*

DISCUSSION

The petition for certiorari should be denied. The court of appeals correctly held that the term "loss" in Article 74 of the Convention does not include attorneys' fees and correctly held that a federal court may not use its inherent authority to award attorneys' fees as a sanction for the conduct giving rise to the litigation or for conduct during the litigation that is sanctionable under a statute or rule. These holdings, moreover, do not conflict with any decision of this Court or any other court of appeals. Review is particularly unwarranted because the court of appeals' decision is interlocutory and the district court might impose the same sanctions on remand under the correct legal standards.

A. The Court Of Appeals Correctly Held That Attorneys' Fees Are Not A Form Of "Loss" Under Article 74 Of The Convention And Its Decision Does Not Conflict With The Decision Of Any Other Court Of Appeals

1. Under Article 74 of the Convention, damages for breach of contract consist of the foreseeable "loss" from the breach, but neither Article 74 nor any other provision of the Convention makes any reference to attorneys' fees. Indeed, as Harry M. Flechtner, one of the leading academic authorities on the Convention, has observed, it appears "from the formal records of the [treaty's] history" that "the subject of recovering attorneys' fees never arose during [its] drafting and negotiation." Harry M. Flechtner, *Recovering Attorney's Fees as Damages Under the U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice, with Comments on Zapata Hermanos*

v. Hearthside Baking, 22 Nw. J. Int'l L. & Bus. 121, 151 (2002). Petitioner nevertheless contends that, because Article 74 "broadly provides for the recovery of *all* foreseeable 'loss[es]'" (Pet. 15), the availability of attorneys' fees is, in the language of Article 7(2), "expressly settled" in the Convention. The court of appeals correctly held otherwise.

Many of the countries that are parties to the Convention have a procedural rule of general applicability concerning a prevailing party's entitlement to an award of attorneys' fees. In some of those countries prevailing parties have such a right. See, *e.g.*, Flechtner, *supra*, 22 Nw. J. Int'l L. & Bus. at 154 n.87 (Germany, France, Italy, Sweden); Joseph Lookofsky, *Commentary: Zapata Hermanos v. Hearthside Baking*, 6 Vindobona J. Int'l Com. L. & Arb. 27, 28 n.10 (2002) (Denmark). In at least one other—the United States—they do not. See *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Interpreting the term "loss" in Article 74 to include attorneys' fees would thus make what is otherwise an issue of procedure an issue of substantive contract law.[1] Adopting that interpretation would also mean that Article 74 is an exception to the American rule and that it might displace the more general loser-pays rules, and the corresponding bodies of law, that apply in other countries. Because of these far-reaching consequences, it is appropriate to require explicit language addressing attorneys' fees before such an interpretation is adopted. Cf. *Key Tronic Corp.*

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[1] While there may be some debate about whether attorneys' fees are properly construed as procedural or substantive, see, *e.g.*, *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 292 (1994) (Scalia, J., concurring in the judgment), and indeed the proper characterization may depend on context, see, *e.g.*, *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 726 (1988), there is little question that attorneys' fees are an ancillary matter that is distinct from the underlying substantive law of contracts, see, *e.g.*, *Landgraf*, 511 U.S. at 277; *White* v. *New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451-452 (1982).

v. *United States*, 511 U.S. 809, 819 (1994) (noting "general practice of not awarding fees to a prevailing party absent explicit statutory authority"). And because there is no such explicit language in the Convention, the proper construction of the term "loss" in Article 74 is that it does not include attorneys' fees, but rather leaves that issue to domestic procedural law. Cf. *id.* at 814-819 (provisions of CERCLA allowing recovery of "necessary costs of response" and "enforcement activities" do not allow recovery of attorneys' fees).[2]

Petitioner's interpretation would also raise difficult questions concerning the relationship between Article 74 and the general attorneys'-fees rules in loser-pays jurisdictions. If foreseeable attorneys' fees were necessarily part of a prevailing plaintiff's "loss," courts in those countries would have to decide whether prevailing defendants could recover attorneys' fees and whether prevailing plaintiffs could recover unforeseeable attorneys' fees that would not constitute a loss under Article 74. As the court of appeals recognized, the availability of an interpretation that avoids these difficulties is "another reason to reject [petitioner's] interpretation." Pet. App. 4a.

Petitioner relies (Pet. 9) on the principle that a treaty should be given "a meaning consistent with the shared ex-

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[2] Article 77 of the Convention, which appears in the same section as Article 74 and requires plaintiffs to "mitigate the loss * * * resulting from the breach," lends further support to this view. If "loss" included attorneys' fees, a defendant would be entitled to a determination of whether the plaintiff had mitigated his attorneys' fees. But the idea of mitigating attorneys' fees is either a *non sequitur* or would require a detailed inquiry into the necessity and reasonableness of the fees, issues presently addressed by domestic law in countries with a loser-pays rule. That the Convention provides no guidance on this matter suggests that the term "loss," in Article 74, encompasses only pre-litigation losses for which mitigation is a workable and established concept.

pectations of the contracting parties," *Air France* v. *Saks*, 470 U.S. 392, 399 (1985), but points to no reason to believe that any party to the Convention expected that a plaintiff's "loss" would include its attorneys' fees, let alone that there was such a "shared" expectation. As the court of appeals correctly observed, "the question whether 'loss' includes attorneys' fees would have held little interest" to the vast majority of the parties, and there is therefore "no reason to suppose they thought about that question at all." Pet. App. 4a. In those countries, which are loser-pays jurisdictions, attorneys' fees are available under domestic procedural law. The question makes a material difference only in an American-rule jurisdiction, and there is simply no reason to think that any other countries considered how Article 74 would apply in American courts. Nor, given the absence of any reference to attorneys' fees in the Convention or its negotiating history, is there any reason to suppose that the United States' representatives thought about that question either, or that the Senate did so when it approved the Convention, much less that there was a knowing and willing decision to abandon the American rule for an entire category of cases.

2. Article 7(1) of the Convention provides that, in interpreting the Convention, "regard is to be had to its international character and to the need to promote uniformity in its application." Petitioner contends (Pet. 8-14) that the court of appeals violated this provision by disregarding decisions of courts in other countries that have interpreted Article 74 to permit an award of attorneys' fees and by applying the American rule instead. This contention is meritless.

a. As an initial matter, petitioner's contention largely begs the question. There is no question that the enforcement of the Convention is left to domestic courts, and its substantive provisions will therefore be enforced through a variety of procedural means. Accordingly, while uniformity

is important in applying the Convention's substantive terms, variation in the procedural rules employed in cases involving the Convention is inevitable. As a result, foreign decisions awarding attorneys' fees to the prevailing party in a contract action under the Convention pursuant to domestic law, or without specifically addressing the scope of the treaty term "loss," do not implicate the interest in the uniform interpretation of *treaty terms*.

Petitioner is also mistaken in its suggestion (Pet. 10-11 & n.5; Reply Br. 1) that there is an international consensus that attorneys' fees are recoverable under Article 74. After surveying the foreign decisions in this area, Professor Flechtner made a number of findings. First, of the seven decisions that have interpreted Article 74 to permit an award of attorneys' fees, none was rendered by the country's highest court and "most were from low-ranking trial-level tribunals." Flechtner, *supra*, 22 Nw. J. Int'l L. & Bus. at 146. Second, those decisions were rendered by courts and arbitration panels in only three countries (Germany, Switzerland, and France), each of which is a "civil law jurisdiction with a loser-pays approach to attorneys' fees in its domestic law." *Id.* at 147. Third, none of the decisions cited any authority from outside its jurisdiction and only one displayed any "awareness that legal systems elsewhere in the world (such as the U.S.) do not routinely allow prevailing litigants to recover attorney costs." *Id.* at 149. Fourth, and most significantly, "probably the vast majority of European cases" governed by the Convention awarded attorneys' fees under the forum's loser-pays rule, and can therefore be viewed as "counter-precedents" to the decisions that awarded such fees under Article 74. *Id.* at 148. Those cases at least implicitly recognize that attorneys' fees are not a recoverable "loss" under Article 74, but rather are recoverable under the domestic law that authorizes the award of fees to prevailing parties. On the basis of these findings, Professor Flechtner concluded that

the decisions interpreting Article 74 to permit the award of attorneys' fees "are due minimal deference as precedents." *Id.* at 150.[3]

In any event, Article 7(1)'s reference to "the need to promote uniformity in [the Convention's] application" is not appreciably different from the rule that judicial decisions from other countries interpreting a treaty term are "entitled to considerable weight." *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999) (quoting *Air France*, 470 U.S. at 404). And that interpretive principle is subordinate to the most basic ones: that "analysis must begin * * * with the text of the treaty and the context in which the written words are used," *Air France*, 470 U.S. at 397; and end there "where the text is clear," *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989). If, however, the text's meaning remains ambiguous, courts "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Air France*, 470 U.S. at 396 (quoting *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431-432 (1943)). Those are the principles on which the court of appeals relied. See Pet. App. 3a.

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[3] In a subsequent article, Professor Flechtner and a co-author summarized his findings as follows:

> The small number of sometimes-ambiguous and ill-reasoned precedents favouring an award of Art. 74 damages to cover attorney fees * * * fades to virtual insignificance when compared to the vast—nay, overwhelming—majority of [Convention] decisions in which the recovery of attorney fees has apparently been treated, without comment by the deciding tribunal, * * * as a matter governed by the domestic law of the forum.

Harry Flechtner & Joseph Lookofsky, *Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal*, 7 Vindobona J. Int'l Com. L. & Arb. 93, 95 (2003).

Petitioner does not take the position that foreign decisions must be *followed* in this case. Instead, petitioner contends (Pet. 9; Reply Br. 2) that the court of appeals erred in not *considering* the decisions that awarded attorneys' fees under Article 74. But there is no reason to believe that it did not consider them. The court read the parties' briefs and heard their oral arguments before it issued an opinion holding that "loss" under Article 74 does not include attorneys' fees. In issuing the opinion, the court necessarily rejected all of petitioner's arguments for the contrary view, including any argument based on the decisions of foreign tribunals. See Pet. 10 (foreign decisions "were cited by Zapata"). As a general matter of judicial decisionmaking, a court is not obligated to recite and explicitly address every argument made by the party against which it rules. And it is implausible that the parties to the Convention intended to impose such an obligation for arguments based on foreign decisions by including general language in Article 7(1) about "the need to promote uniformity."

b. Petitioner is also mistaken in its contention (Pet. 8-9, 12-14; Reply Br. 4) that the court of appeals relied on "domestic law" in holding that petitioner was not entitled to attorneys' fees. Contrary to petitioner's suggestion (Pet. 8, 12; Reply Br. 4), the court did not simply apply the American rule but construed the term "loss" in Article 74, just as any court in any country would be required to do if confronted with the question presented here. In construing Article 74, moreover, the court applied universally applicable interpretive principles, which are consistent with the principles of treaty interpretation identified by petitioner's amicus. See Amicus Br. 6-7. The court concluded that "'loss' does not include attorneys' fees" (Pet. App. 2a), because the availability of such fees is governed in most countries by "procedural law" of "general applicability," and there is nothing in the text of the Convention reflecting an intention to make

attorneys' fees part of the substantive law of contracts (*id.* at 3a); because petitioner's interpretation "would produce anomalies" (*id.* at 4a); and because there is no reason to believe that the countries with a loser-pays rule thought about the issue or that the United States would have signed the Convention if it had thought that Article 74 was *sub silentio* displacing the American rule (*ibid.*). Whether one agrees with this analysis or not, it cannot be characterized as narrowly "domestic," particularly because the same analysis would lead to the same interpretation of the term "loss" in a loser-pays jurisdiction (although the plaintiff might be able to recover under the general procedural law governing attorneys' fees).

Contrary to petitioner's contention (Pet. 13-14), the court of appeals' interpretation of the Convention is entirely consistent with the Eleventh Circuit's statement in *MCC-Marble Ceramic Center, Inc.* v. *Ceramic Nuova D'Agostino, S.P.A.*, 144 F.3d 1384, 1391 (1998), cert. denied, 526 U.S. 1087 (1999), that courts may not "substitut[e] familiar principles of domestic law when the Convention requires a different result." The court of appeals did not substitute the American rule for a different rule required by the Convention; it applied the American rule after determining that that principle of domestic law is consistent with the Convention.

B. The Court Of Appeals Correctly Held That A Court May Not Use Its Inherent Authority To Impose A Sanction For Pre-Litigation Conduct Or For Litigation Conduct Sanctionable Under A Statute Or Rule And Its Decision Does Not Squarely Conflict With The Decision Of Any Other Court Of Appeals

In *Chambers* v. *NASCO, Inc.*, 501 U.S. 32 (1991), this Court held that the enactment of statutes and rules authorizing the imposition of sanctions in various circumstances does not preclude a court from using its inherent authority to sanction a party for bad-faith conduct. *Id.* at 46-51. Peti-

tioner asks the Court (Pet. 22-30) to grant certiorari to answer two questions that were not explicitly answered in *Chambers*: whether a court may use its inherent authority to impose sanctions for the conduct giving rise to the litigation; and whether a court may use its inherent authority to sanction conduct that occurred during the litigation but is sanctionable under a statute or rule. As explained below, review is not warranted on either question.

1. In *Chambers*, the Court approved an award of attorneys' fees as a sanction for the defendant's conduct during the litigation of a breach-of-contract suit. 501 U.S. at 54 & n.17. It "express[ed] no opinion as to whether the District Court would have had the inherent power to sanction [the defendant] for conduct relating to the underlying breach of contract." *Id.* at 54 n.16. The four dissenting Justices were of the view that courts do *not* have the authority to sanction a party for pre-litigation conduct (and that the conduct for which sanctions were imposed in that case was in fact pre-litigation conduct, such that the award of attorneys' fees was inappropriate). *Id.* at 60 (Scalia, J., dissenting); *id.* at 72-76 (Kennedy, J., dissenting). Petitioner contends (Pet. 26-28) that there is a circuit conflict on the question left open in *Chambers*, and that the Court should grant certiorari to resolve it. Petitioner overstates the extent of the conflict.

In agreement with the Justices who addressed the issue in *Chambers*, every court of appeals to consider the question has held, correctly, that attorneys' fees may not be awarded solely as a sanction for the conduct giving rise to the litigation.[4] Like the court of appeals in this case (Pet. App. 7a),

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[4] See *Kerin* v. *United States Postal Serv.*, 218 F.3d 185, 195 (2d Cir. 2000) ("bad faith fees may not be awarded solely on the basis of pre-litigation business conduct"); *Towerridge, Inc.* v. *T.A.O., Inc.*, 111 F.3d 758, 766 (10th Cir. 1997) ("circuits that have squarely addressed this issue" have held that "bad faith" exception to American rule "does not reach purely prelitigation * * * conduct"); *Lamb Eng'g & Constr. Co.* v. *Ne-*

those courts concluded that a contrary rule would enable district courts to substitute attorneys' fees for otherwise-unavailable punitive damages and to circumvent the American rule.[5] Petitioner cites only one decision (Pet. 27) in which a court of appeals affirmed an award of attorneys' fees based on pre-litigation conduct. See *United States ex rel. Yonker Constr. Co.* v. *Western Contracting Corp.*, 935 F.2d 936, 942 (8th Cir. 1991) ("Bad faith may occur during either contract performance or litigation."). And as the Eighth Circuit has subsequently made clear, that decision is consistent with the rule that conduct giving rise to the litigation alone cannot justify an award of attorneys' fees, because in that case the defendant "acted in bad faith in performing the []contract *and* in initiating its counterclaim," the latter of which the Eighth Circuit characterized as "litigation conduct." *Lamb*, 103 F.3d at 1436.

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braska Pub. Power Dist., 103 F.3d 1422, 1437 (8th Cir. 1997) ("the district court's inherent power to award attorney fees as a sanction for bad faith conduct does not extend to pre-litigation conduct"); *Association of Flight Attendants* v. *Horizon Air Indus., Inc.*, 976 F.2d 541, 549 (9th Cir. 1992) ("uniform view among the circuits" is that "it is impermissible to allow a District Court acting pursuant to its inherent authority to sanction * * * prelitigation * * * conduct"); *Sanchez* v. *Rowe*, 870 F.2d 291, 294 (5th Cir. 1989) (refusing to extend "bad-faith exception" to American rule to "the acts giving rise to the substantive claim"); *Woods* v. *Barnett Bank of Fort Lauderdale*, 765 F.2d 1004, 1014 (11th Cir. 1985) ("The bad faith or vexatious conduct must be part of the litigation process itself."); *Shimman* v. *International Union of Operating Eng'rs, Local 18*, 744 F.2d 1226, 1233 (6th Cir. 1984) (en banc) ("the bad faith exception to the American Rule does not allow an award of attorney fees based only on bad faith in the conduct giving rise to the underlying claim"), cert. denied, 469 U.S. 1215 (1985).

[5] See *Towerridge*, 111 F.3d at 765-766; *Lamb Eng'g & Constr. Co.*, 103 F.3d at 1435; *Association of Flight Attendants*, 976 F.2d at 550; *Sanchez*, 870 F.2d at 294; *Shimman*, 744 F.2d at 1231, 1232 n.9.

As for the narrower question whether a court may sanction pre-litigation conduct when there is also "sanctionable conduct *during* the litigation" (Reply Br. 10), it is not clear that that question will have any significance in this case, because it is not clear how much of the conduct that gave rise to the fee award is properly classified as pre-litigation conduct and whether the amount of fees associated with the litigation conduct alone is materially different from the amount associated with the litigation and pre-litigation conduct together. For example, to the extent that the litigation misconduct is sufficiently egregious to justify an award of all the fees incurred by petitioner, any pre-litigation misconduct could not have any effect on fees. In light of the court of appeals' understandable refusal to "pick through the record" (Pet. App. 9a) and analyze specific fee claims at this interlocutory stage, any difference between the Seventh and Eighth Circuit's approach might have no effect on the fee award.[6]

2. In approving the award of attorneys' fees in *Chambers*, the Court stated that, while a court "ordinarily should rely" on statutes or rules to punish conduct that "could be adequately sanctioned" under them, a court may rely on its inherent authority when the statutes and rules are not "up to the task." 501 U.S. at 50. The Court then noted an exception to this general principle, which it applied in the case

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[6] Even if there is a material difference between the approach of the Seventh Circuit in this case and that of the Eighth Circuit in *Yonker*, the difference does not justify this Court's review. The Eighth Circuit substantially limited *Yonker* in *Lamb*, and also read another Eighth Circuit case narrowly to conform it to the case law of other circuits. See *Lamb*, 103 F.3d at 1435-1436. If allowing sanctions for pre-litigation misconduct when there is also litigation misconduct ever makes a practical difference in application, *Lamb* suggests that the Eighth Circuit might further modify its case law, and in the event it does not, certiorari might then be appropriate.

before it. When conduct sanctionable under statutes or rules is "intertwined" with conduct that is not, the Court said, a court may sanction all of the conduct under its inherent authority, because a contrary requirement would "serve only to foster extensive and needless satellite litigation," which is "contrary to the aim" of the Federal Rules of Civil Procedure. *Id.* at 51. Petitioner contends (Pet. 22-26) that there is a circuit conflict over the meaning of this passage; that, in particular, courts of appeals are divided on the question whether a court may impose sanctions under its inherent authority if the conduct is sanctionable under a statute or rule; and that the Court should grant certiorari to resolve the conflict. Once again, petitioner overstates the conflict.

Petitioner cites no decision (Pet. 24-25; Reply Br. 8-9) that is inconsistent with *Chambers'* teaching that a court should exercise its inherent authority when statutes and rules are not "up to the task." 501 U.S. at 50. In particular, petitioner cites no decision in which a court of appeals found that all of the bad-faith conduct in question was sanctionable under a statute or rule but nevertheless affirmed a sanction imposed under the district court's inherent authority. Two of the decisions cited by petitioner did not address the propriety of an inherent-authority sanction;[7] several did address that issue but were cases in which the conduct was found (or assumed) *not* to be sanctionable under a rule or statute;[8] and

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[7] See *Nick* v. *Morgan's Foods, Inc.*, 270 F.3d 590, 594-595 n.2 (8th Cir. 2001) ("we do not need to rely on the inherent power doctrine because we hold that the district court was authorized to sanction under Rule 16 and the local rules"); *Travelers Ins. Co.* v. *St. Jude Hosp., Inc.*, 38 F.3d 1414, 1418 (5th Cir. 1994) (rejecting claim that "a court must consider Rule 11 before [28 U.S.C.] § 1927").

[8] See *Pickholtz* v. *Rainbow Techs., Inc.*, 284 F.3d 1365, 1376 (Fed. Cir. 2002) (Fed. R. Civ. P. 37 "[wa]s not a proper basis for awarding attorney fees"); *DLC Mgmt. Corp.* v. *Town of Hyde Park*, 163 F.3d 124, 135 (2d Cir. 1998) (sanctions "could not have been granted pursuant to Fed. R. Civ. P.

one fell within *Chambers*' exception for cases in which "the conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address" (501 U.S. at 51).[9] The other two decisions that petitioner cites are ambiguous. One of them rejected the argument that the district court should have "consider[ed] sanctions available under Rule 11 or 28 U.S.C. § 1927" before considering the use of its inherent authority. *Fink* v. *Gomez*, 239 F.3d 989, 994 (9th Cir. 2001). It is not at all clear that that decision supports petitioner's position, however, because there was no finding that the conduct in question was in fact covered by Rule 11 or Section 1927, and the court of appeals' response to the argument that they should have been considered was a paraphrase of *Chambers*' statement that a court may rely on its inherent authority when the statutes and rules are not "up to the task." 501 U.S. at 50.[10] In the other decision, the court said, in a footnote, that the fact that sanctions "may have been possible" under a statute or rule "did not negate the district court's inherent power to levy sanctions." *Thomas* v. *Tenneco Packaging Co.*, 293 F.3d 1306, 1328 n.32 (11th Cir. 2002). But since there was no

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37 * * * or 42 U.S.C. § 1988"); *In re Weiss*, 111 F.3d 1159, 1172 (4th Cir.) (conduct "d[id] not technically fall under the auspices of [Bankruptcy] Rule 9011"), cert. denied, 522 U.S. 950 (1997); *Resolution Trust Corp.* v. *Dabney*, 73 F.3d 262, 267 (10th Cir. 1995) (assuming that "it w[as] error for the district court to base its sanction [on 28 U.S.C.] § 1927"); *In re Mroz*, 65 F.3d 1567, 1574 (11th Cir. 1995) (Bankruptcy Rule 9011 did not cover conduct).

[9] See *First Bank of Marietta* v. *Hartford Underwriters Ins. Co.*, 307 F.3d 501, 513, 516-518 (6th Cir. 2002).

[10] Compare *Fink*, 239 F.3d at 994 ("[T]he district court may, in its informed discretion, rely on inherent power rather than the federal rules or § 1927. *See Chambers*, 501 U.S. at 50.") with *Chambers*, 501 U.S. at 50 ("[I]f in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.").

finding that all (or even any) of the conduct at issue was sanctionable under a statute or rule, it is not clear whether that language should be read to mean that a court may rely on its inherent authority even when a statute or rule is "up to the task" (*Chambers*, 501 U.S. at 50) or only that "the various sanctioning provisions" of the statutes and rules do not "reflect a legislative intent to displace the inherent power" (*id.* at 42-43).

C. The Interlocutory Posture Of The Case Is An Additional Reason To Deny Certiorari

The court of appeals held that attorneys' fees are not a form of "loss" under Article 74 of the Convention and that a district court may not use its inherent authority to award attorneys' fees as a sanction either for the conduct that gave rise to the litigation or for conduct during the litigation that is sanctionable under the Federal Rules of Civil Procedure. The court did not hold, however, that petitioner was not entitled to attorneys' fees. Instead, it remanded the case so that the district court could decide whether any of respondent's litigation conduct was sanctionable "apart from Rule 11 and Rule 37." Pet. App. 9a. This Court will "generally await final judgment in the lower courts before exercising [its] certiorari jurisdiction," *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari), and there is good reason to follow that practice here.

On remand, it is possible that the district court will find that respondent engaged in bad-faith conduct during the course of the litigation and that at least some of that conduct is "not adequately dealt with by other rules." Pet. App. 7a. If it makes such a finding, it may be able—and may choose—to impose the same sanction that was imposed before the appeal, a result that would render irrelevant the answers to the questions presented in the petition. Even if the ques-

tions otherwise warranted the exercise of this Court's certiorari jurisdiction, therefore, the interlocutory posture of the case would "furnish[] sufficient ground" for denial of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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